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No. 98-237

In The
Supreme Court of the United States
October Term, 1998

ROBERTSON, STEPHENS & COMPANY,
Petitioner,

v.

TONYJA DUFFIELD,
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For the Ninth Circuit

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR *CERTIORARI*

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICUS 1

SUMMARY OF THE FACTS 2

SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

I. The *Duffield* Decision Below Misread the Text, Legislative History and Purpose of Section 118. 4

A. The Ninth Circuit's Use of Legislative History Rewrote the Plain Meaning of Section 118. 4

B. Congress Was, In Fact, Aware of the *Gilmer* Decision When It Passed the CRA 8

C. The Underlying Purpose of the CRA Evinces No Congressional Intent to Preclude Pre-Dispute Arbitration. 10

II. The *Duffield* Decision Below Ignored a Presumption of Statutory Construction Enunciated by This Court, As Well As Subsequent Legislative Activity in Congress 11

A. Congress Is Presumed to Know the Court's Interpretation of the Law as It Exists at the Time Legislation Is Passed 11

B. Subsequent Congressional Efforts to Amend the CRA Demonstrate Congress's Understanding That Current Law Does Not Preclude Pre-Dispute Arbitration Agreements. 12

III. Contrary Views Among the Courts of Appeals and the Equal Employment Opportunity Commission Make this Case Particularly Appropriate for *Certiorari*. 13

A. Employers Have a Strong Interest in the Resolution of this Case Because Until Now the Courts of Appeals Have Held That Most Workplace Arbitration Agreements Are Governed by the Federal Arbitration Act..... 13

B. The Court Should Provide Definitive Guidance With Respect to Employment Discrimination Legislation..... 15

C. The Employer Community Is Increasingly Turning to Alternative Dispute Resolution, Including Arbitration, to Resolve Employment Disputes. 16

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 6, 9, 10

Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir. 1991) 13

Armijo v. Prudential Insurance Co. of America, 72 F.3d 793 (10th Cir. 1995) 15

Asplundh Tree Expert Co. v. Bates, 71 F.3d 592 (6th Cir. 1995) 14

Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698 (11th Cir. 1992) 13

Cannon v. University of Chicago, 441 U.S. 677 (1979) 12

Cole v. Burns Int'l Security Services, 105 F.3d 1465 (D.C. Cir. 1997) ..... passim

Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987) 10

Dickstein v. duPont, 443 F.2d 783 (1st Cir. 1971) 14

Duffield v. Robertson, Stephens & Company, 144 F.3d 1182 (9th Cir. 1998) ..... passim

Erving v. Virginia Squires Basketball Club, 468 F.2d 1064 (2d Cir. 1973) 14

Evans v. Jeff D., 475 U.S. 717 (1986) 10

Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998) 12

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995) 8

Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992) 12

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) ..... passim

Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1990) 11

Great Western Mortgage Corp. v. Peacock, 110 F.3d 222 (3d Cir.) *cert. denied*, 118 S. Ct. 299 (1997) 14

Independent Federation of Flight Attendants v. Zipes, 491 U.S. 754 (1989) 10

Keene Corp. v. United States, 508 U.S. 200 (1993) 12

Landgraf v. USI Film Products, 511 U.S. 244 (1994) 6, 9

Library of Congress v. Shaw, 478 U.S. 310 (1986) 10

Lorance v. AT & T Technologies, 490 U.S. 900 (1989) 10

Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932 (9th Cir. 1992) 13

Martin v. Chesny, 473 U.S. 1 (1985) 10

Martin v. Wilks, 490 U.S. 755 (1989) 10

McWilliams v. Logicon, Inc., 143 F.3d 573 (10th Cir. 1998) 14

Miles v. Apex Marine Corp., 498 U.S. 19 (1990) 11

Miller Brewing Co. v. Brewery Workers Local Union No. 9, AFL-CIO, 739 F.2d 1159 (7th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985) 14

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 7

Mouton v. Metropolitan Life Insurance Co., 147 F.3d 453 (5th Cir. 1998) 2, 15

Oncale v. Sundowner Offshore Services, Inc., 118 S. Ct. 998 (1998) 9

Paladino v. Avnet Computer Tech Inc., 134 F.3d 1054 (11th Cir. 1998) 14

Patterson v. McLean Credit Union, 491 U.S. 164 ..... 10, 15

Patterson v. Tenet Healthcare, Inc., 113 F.3d 832 (8th Cir. 1997) 2

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) 10

Pryner v. Tractor Supply Co., 109 F.3d 354 (7th Cir. 1997) 13

Rivers v. Roadway Express, 511 U.S. 298 (1994) 15

Rodriguez de Quijas v. Shearson/American Express Inc., 490 U.S. 477 (1989) 7

Rojas v. TK Communications, Inc., 87 F.3d 745 (5th Cir. 1996) 14

Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 995 F. Supp. 190 (D. Mass. 1998) 2

Seus v. John Nuveen & Co., 146 F.3d 175 (3d Cir. 1998) 2, 11, 14, 15

Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) 7

Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) 10

Wright v. Universal Maritime Service Corp., cert. granted, 118 S. Ct. 1162 (U.S. March 2, 1998) (No. 97-889) 1

STATUTES

42 U.S.C.A. § 1981 (West 1994) 5

Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq 4, 5, 9, 13

Americans with Disabilities Act, 42 U.S.C. §§ 12111 et seq 5

Civil Rights Act of 1870, 42 U.S.C. § 1981 5

Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071 (1991) 5

Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. .....passim

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. 5, 9

LEGISLATIVE MATERIALS

137 Cong. Rec. H9530 (daily ed. Nov. 7, 1991) (statement of Representative Don Edwards).....9

137 Cong. Rec. H9548 (daily ed. Nov. 7, 1991) (statement of Representative Henry Hyde).....8

137 Cong. Rec. S15472, S15478 (daily ed. Oct. 30, 1991) (statement of Senator Robert Dole).....8

H.R. 3748, 104th Cong., 2d Sess. (1996).....13

H.R. Rep. No. 40(I), 102d Cong., 1st Sess. (April 24, 1991) (Education and Labor Committee).....6

H.R. Rep. No. 40(II), 102d Cong., 1st Sess. (May 17, 1991) (Judiciary Committee).....6, 11

S. 2012, S. 2327, and H.R. 4981/S. 2405, 103d Cong., 2d Sess. (1994).....13

S. 366, 104th Cong., 1st Sess. (1995).....13

OTHER AUTHORITIES

1997 EEOC Policy Statement, No. 915.002, July 10, 1997.....16

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Equal Employment Opportunity Commission National Enforcement Plan, January 15, 1997 16

John Zinsser, *Employment Dispute Resolution Systems: Experience Grows But Some Questions Persist,* Negotiation J. (April 1996) 17

R. Gaull Silberman, Susan Murphy, and Susan Adams, *Alternative Dispute Resolution of Employment Discrimination Claims*, 54 La. L. Rev. 1533 (1994) 18

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Theodore J. St. Antoine, *Mandatory Arbitration of Employee Discrimination Claims: Unmitigated Evil or Blessing In Disguise?*, 15 Thomas M. Cooley Law Rev. 1 (1998). 19

U.S. General Accounting Office, Employment Discrimination: Most Private-Sector Employers Use Alternative Dispute Resolution, GAO/HESH-95-150 (July 5, 1995) 17

INTEREST OF THE AMICUS[1,2]

The Chamber of Commerce of the United States ("the Chamber") is the world's largest business federation. The Chamber has substantial membership in each of the 50 states, and through its federation of members represents more than 3,000,000 businesses and professional organizations of every size and in every sector of the economy. The Chamber, therefore, serves as the principal voice of American employers.

Among its activities, the Chamber represents the interests of members on matters pending before the judiciary and the other branches of government. The Chamber has participated as an *amicus curiae* in numerous cases before this Court, including cases similar to this case, such as *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) and *Wright v. Universal Maritime Service Corp., cert. granted*, 118 S. Ct. 1162 (U.S. March 2, 1998) (No. 97-889).

Since the Court decided *Gilmer* more than seven years ago, many of the Chamber's members have adopted alternative dispute resolution ("ADR") programs for their employees, including arbitration. An increasing number of those employers require employees to agree to arbitration before a dispute arises, in order to obtain employment. Still more employers are developing or considering ADR

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[1] The Chamber hereby certifies, in accordance with Supreme Court Rule 37.6, that no counsel for a party authored this brief in whole or in part, and no person or entity other than the Chamber of Commerce of the United States, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

[2] Letters from the Parties' counsel, stating their consent to the Chamber's participation as an *amicus curiae*, are attached, in accordance with Supreme Court Rule 37.2(a).

programs, which may include pre-dispute arbitration agreements.

The decision of the U.S. Court of Appeals for the Ninth Circuit below conflicts with subsequent decisions of two Circuits.[3] The *Duffield* decision also conflicts with the previous decisions of at least two other Circuits.[4] It has left employers uncertain about the enforceability of arbitration agreements as they apply to employment discrimination claims, in both the Ninth Circuit and in other Circuits that have yet to address the issue.[5]

A definitive ruling from this Court on the issue presented in the petition for *certiorari* would not only resolve the dispute between the parties, but also would provide guidance to the entire employer community regarding when, and to what extent, agreements to arbitrate claims arising under Title VII and other employment discrimination statutes are legally binding. Consequently, the Chamber urges the Court to grant *certiorari* to consider the important issue raised in this case.

SUMMARY OF THE FACTS

Tonyja Duffield, a successful and sophisticated securities broker, brought this action against her former employer, Robertson, Stephens & Co., alleging employment discrimination on the basis of sex. Robertson, Stephens moved to compel arbitration of her claims, in accordance with

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[3] *See Mouton v. Metropolitan Life Ins. Co.*, 147 F.3d 453 (5th Cir. 1998); *Seus v. John Nuveen & Co.*, 146 F.3d 175 (3d Cir. 1998).

[4] *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832 (8th Cir. 1997); *Cole v. Burns Int'l Sec. Svcs.*, 105 F.3d 1465 (D.C. Cir. 1997).

[5] An additional case, which is consistent with *Duffield*, is pending before the U.S. Court of Appeals for the First Circuit. *See Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 995 F. Supp. 190 (D. Mass. 1998), *appeal pending*.

the arbitration agreement contained in her application for licensure as a securities broker[6] and her employment contract.

The U.S. District Court for the Northern District of California agreed that Ms. Duffield's employment discrimination claims were subject to arbitration as a matter of contract, but certified the question of whether the Civil Rights Act of 1991 ("CRA") precludes arbitration to the U.S. Court of Appeals for the Ninth Circuit. On May 8, 1998, Judge Stephen Reinhardt issued an opinion for the court stating that the legislative history of the CRA demonstrated that the U.S. Congress intended to preclude compulsory agreements to submit Title VII claims to arbitration. *See* 144 F.3d 1182 (9th Cir. 1998). Therefore, Ms. Duffield did not have to arbitrate her Title VII and related state law discrimination claims.

Robertson, Stephens & Co. timely filed a petition for *certiorari* seeking to overturn the Ninth Circuit's decision. As discussed below, the Chamber supports this petition.

SUMMARY OF THE ARGUMENT

The Ninth Circuit interpreted a provision of the CRA that states that employers and employees are "encouraged" to use various ADR methods to resolve employment discrimination claims, and concluded that this provision actually *prohibits* enforcement of agreements to arbitrate, when such agreements are made before a dispute arises. Its opinion is based upon a selective and forced reading of the legislative history of Section 118 of the CRA. Because this Court, in *Gilmer*, endorsed the use of ADR to resolve age discrimination claims

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[6] The application, known as the U-4, is an agreement similar to the agreement that Robert Gilmer (petitioner in the *Gilmer* case) and thousands of other securities brokers have signed as a condition of their registration with the New York Stock Exchange and the National Association of Securities Dealers.

during Congress's debate on the CRA, the legislative history of Section 118 is far from clear. A fair and reasonable reading of the legislative history indicates that different Members of Congress understood the provision differently, at different times. In this circumstance, the Court should avoid relying on legislative history and instead apply the plain meaning of the statute, as passed by the full Congress. Otherwise, this Court might approve an interpretation that the statute means almost the opposite of what it says.

Given the unhelpful nature of the CRA's legislative history, and the strong interest in ensuring that those who are bound by the law can understand what it requires of them, the Court should grant *certiorari*. It is critical for employers that the Court consider whether Section 118 of the CRA means what it says, as two other Circuits have held, or whether – based on the sketchy, contradictory, and inconclusive comments of various legislators – Section 118 somehow precludes pre-dispute arbitration agreements for employment discrimination claims.

ARGUMENT

I. The *Duffield* Decision Below Misread the Text, Legislative History and Purpose of Section 118.

A. The Ninth Circuit's Use of Legislative History Rewrote the Plain Meaning of Section 118.

Despite the Ninth Circuit's proclaimed reliance upon this Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), which enforced arbitration of a claim under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* ("ADEA"), the appeals court reached the opposite result with respect to a claim under Title VII of the

Civil Rights Act of 1964 ("Title VII"), as amended by the Civil Rights Act of 1991.[7]

Section 118 of the CRA states:

> ALTERNATE MEANS OF DISPUTE RESOLUTION. Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is *encouraged* to resolve disputes arising under the Acts or provisions of Federal law amended by this title. (emphasis added).[8]

Pub. L. 102-166, 105 Stat. 1071, 1081 (1991), *reprinted in* the notes to 42 U.S.C.A. § 1981 (West 1994). Judge Reinhardt concluded that this language evinces a Congressional intent to preclude pre-dispute arbitration agreements as they apply to Title VII claims.

Relying principally on two U.S. House of Representatives Committee Reports, prepared near the time that the legislation was drafted, this conclusion rests on an erroneous interpretation of the CRA's legislative history. Moreover, reliance upon legislative history is both unnecessary and inappropriate in this case.

The Court issued the *Gilmer* decision on May 13, 1991. The U.S. Senate passed the CRA on October 30, 1991. The House of Representatives passed the CRA on November 7,

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[7] 42 U.S.C.A. §§ 2000e *et seq.* (West 1994).

[8] The major civil rights statutes amended by the CRA are: the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*; the Civil Rights Act of 1870, 42 U.S.C. § 1981; Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*; and the Americans with Disabilities Act, 42 U.S.C. §§ 12111 *et seq.*

1991. President Bush signed the CRA into law on November 21, 1991. Therefore, *Gilmer* predates the passage of the CRA by almost six months. Nevertheless, the Ninth Circuit relied upon Committee Reports issued before, and a few days after, *Gilmer* to conclude that Congress intended to codify the Court's earlier decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).[9] *Gardner-Denver* had held that arbitration agreements contained in collective bargaining agreements do not preclude Title VII employment discrimination claims brought in court.

This reasoning is flawed, for a variety of reasons. Most troubling for employers charged with following the law is the appeals court's willingness to look beyond the plain meaning of the statute to "discover" alternative meanings. As this Court has noted, "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994) (rejecting retroactive application of the CRA absent a clear Congressional intent to apply the new statute retroactively).

Also problematic, the statutory phrase "to the extent authorized by law" does not necessarily refer to either *Gardner-Denver* or *Gilmer*. It could refer to arbitration of statutory disputes *generally*. At the time that the CRA was drafted, there was ample law supporting the use of arbitration

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[9] No Senate Committee Report was issued on the bill that became the CRA. However, two House Committees issued reports approving the bill. *See* H.R. Rep. No. 40(I), 102d Cong., 1st Sess. (April 24, 1991) (Education and Labor Committee); H.R. Rep. No. 40(II), 102d Cong., 1st Sess. (May 17, 1991) (Judiciary Committee).

to resolve statutory disputes, albeit not disputes arising under the civil rights laws.[10]

Furthermore, Judge Reinhardt acknowledged that Section 118 "does not automatically lend itself to a fixed definition. It most likely codifies the 'law' as Congress understood it at the time it either *drafted* or *passed* the provision." 144 F.3d at 1194 (emphasis added). The Ninth Circuit never analyzed, however, which point in time should prevail for statutory interpretation purposes when, as here, Congress drafts and then passes a cross-reference to decisional law, which changes significantly in the interim. The Ninth Circuit's focus on the Committee Reports at the drafting stage is misplaced in this unusual context of a cross-reference provision coupled with an intervening change in the law.

In this context, the focus should be on the point in time when legislation is passed by Congress as a whole. Given the sequence of events here, "no amount of commentary from individual legislators or committees" should undo "[t]he text adopted by the full Congress." *Seus*, 146 F.3d at 182.

The text of Section 118 shows that Congress in fact intended to "encourage" arbitration of employment discrimination claims. Clearly, Congress also entrusted enforcement, in appropriate circumstances, to the courts. A case-by-case determination of "appropriate circumstances" is

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[10] *See, e.g.*, the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* ("FAA"); *Rodriguez de Quijas v. Shearson/American Express Inc.*, 490 U.S. 477 (1989) (Securities Act claims are arbitrable under the FAA); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (Racketeer Influenced and Corrupt Organizations Act claims are arbitrable under the FAA); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (Sherman Act claims are arbitrable under the FAA). *Gilmer* advanced this established policy in favor of arbitration of statutory claims in the midst of the lengthy debate on the CRA.

eminently suited to the judicial function. *See Gilmer*, 500 U.S. at 26 (courts determine arbitrability – mindful that federal policy favors arbitration and that the party opposing it bears the burden to show Congressional preclusion as to statutory claims).[11]

The Ninth Circuit's interpretation of Section 118 contradicts what the provision states in straightforward and understandable language. Congress *wanted* employers and employees to utilize ADR. The *Duffield* decision creates confusion for those the law was intended to regulate, *i.e.*, the parties who were "encouraged" to adopt arbitration clauses and other ADR programs by the CRA and by *Gilmer*.

B. Congress Was, In Fact, Aware of the *Gilmer* Decision When It Passed the CRA.

The legislative history of the CRA, as well as a comprehensive review of the Congressional Record for 1991, demonstrate that Congress was, in fact, aware of the *Gilmer* decision, and had analyzed its effect before the full Congress passed the CRA. References to *Gilmer* appear in the statements issued by both the majority and minority in Congress when the engrossed legisiation was transmitted to President Bush for his signature. The problem is that their positions on *Gilmer* are contradictory. *Compare* 137 Cong. Rec. S15472, S15478 (daily ed. Oct. 30, 1991) (statement of Senator Robert Dole) (arbitration encouraged where parties knowingly and voluntarily elect to use those methods, in accordance with *Gilmer*), and 137 Cong. Rec. H9548 (daily ed. Nov. 7, 1991) (statement of Representative Henry Hyde)

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[11] *See also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (courts determine the arbitrability of parties' dispute unless the parties clearly and unmistakably submitted that issue to arbitration).

(same) *with* 137 Cong. Rec. H9530 (daily ed. Nov. 7, 1991) (statement of Representative Don Edwards) (rejecting *Gilmer* as applied to Title VII claims and stating that Section 118 applies only to agreements entered into after an employment discrimination dispute has arisen).

Additional references to the decision appear elsewhere in the Congressional Record of 1991. For example, the House Select Committee on Aging held hearings to discuss the impact of *Gilmer* on September 24, 1991, more than a month before the full House passed the CRA.[12]

Yet, reliance upon individual legislators' views is inappropriate. Canvassing the legislative history to see which Senator or Representative thought Section 118 embraced *Gardner-Denver* and which Senator or Representative thought the provision embraced *Gilmer* would be fruitless. "...[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Services, Inc.*, 118 S. Ct. 998, 1002 (1998) (holding that the plain language of Title VII prohibits same-sex sexual harassment, despite the argument that Congress did not intend such a broad meaning when it passed the statute). Relying on the ambiguous and conflicting statements of individual legislators – conceivably with 435 different views in the House and 100 in the Senate – is a misuse of legislative history. See *Landgraf*, 511 U.S. at 262-263 (noting that "frankly partisan" statements about the meaning of the CRA's final language could not possibly be

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[12] *See* H.R. Rep. 102-1093, Activities of the House Select Committee on Aging in the 102nd Congress, December 31, 1992, page 49 (stating, "The Committee also examined the impact of the U.S. Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, No. 90-18 (May 13, 1991))." However, the House Select Committee on Aging reported no conclusion about the relationship between *Gilmer* and Section 118 of the CRA, which – by its terms – applies to the ADEA.

read as general agreement; rather, they suggest an agreement to disagree).[13]

The only meaningful conclusion to be drawn from the legislative record here is that, although some legislators *may* have understood Section 118 to embrace *Gardner-Denver* at the time that the CRA was drafted, disagreement prevailed about whether *Gilmer* expanded arbitration of employment discrimination claims at the time of passage.

C. The Underlying Purpose of the CRA Evinces No Congressional Intent to Preclude Pre-Dispute Arbitration.

It is ironic that the Ninth Circuit read a provision of the CRA that *encourages* the use of ADR to impliedly overrule this Court's decision in *Gilmer*. The CRA was passed in response to several Supreme Court decisions interpreting the civil rights laws, in particular *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). *See* Pub L. 102-166, 105 Stat. 1071 (1991).[14] It is illogical to conclude that an Act which

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[13] *See also* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. Cal. L. Rev. 845, 861 (1991) (concluding that where "legislative history is vague, or seriously conflicting, do not use it").

[14] According to the House Judiciary Committee Report, on which the Ninth Circuit relied for other points, the CRA also was intended to overrule the Supreme Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); modify the decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); limit the holding of *Martin v. Wilks*, 490 U.S. 755 (1989); overrule *Lorance v. AT & T Technologies*, 490 U.S. 900 (1989); clarify *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754 (1989); and otherwise limit or codify the holdings in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987), *Evans v. Jeff D.*, 475 U.S. 717 (1986), *Library of Congress v. Shaw*, 478 U.S. 310 (1986), and *Martin v. Chesny*, 473 U.S. 1 (1985). H.R. Report No. 102-40 (II) (May 17,

was explicitly adopted to modify the law enunciated in those decisions *also* overruled, by implication, a new, pro-ADR decision. Moreover, it is bizarre to conclude that Congress sought to accomplish this purpose by including a provision to "encourage" alternative dispute resolution mechanisms. *See Seus v. John Nuveen & Co.*, 146 F.3d 175, 183 (3d Cir. 1998) (flatly rejecting the argument that the "straightforward declaration of the full Congress [in Section 118] can be interpreted to mean that the [FAA] is impliedly repealed with respect to agreements to arbitrate Title VII claims which were executed by an employee as a condition of securing employment").

In sum, the underlying purpose of the Act evinces no Congressional intent to overrule *Gilmer* and to preclude pre-dispute arbitration.

II. The *Duffield* Decision Below Ignored a Presumption of Statutory Construction Enunciated by This Court, As Well As Subsequent Legislative Activity in Congress.

A. Congress Is Presumed to Know the Court's Interpretation of the Law as It Exists at the Time Legislation Is Passed.

The Court cannot assume that Congress is ignorant of the state of the law when Congress passes legislation referencing other law. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1990). Indeed, Congress is presumed to be knowledgeable about existing law pertinent to the legislation that it enacts. *Id. See also Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). The Court can expect no less of a body of

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1991). *Gilmer*, decided four days before the Report was issued, was not mentioned.

elected representatives than it does of a citizenry presumed to know the law. *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979). When Congress amends a statute in one respect, but provides no modification in another upon which the Court has ruled, the Court presumes that Congress was aware of the judicial interpretation in the latter respect and, in effect, adopted it. *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2286 (1998) *quoting Keene Corp. v. United States*, 508 U.S. 200 (1993); *cf. Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 72 (1992) (holding that Congress ratified the Court's decision in *Cannon v. University of Chicago*, by failing to overturn that decision when it amended the civil rights statute at issue in other respects).

This presumption is a reasonable, appropriate, and necessary one. Without it, statutes would invite continual attack and reinterpretation, and statutory interpretation would devolve into an inconclusive inquiry into the legal knowledge of individual legislators. In essence, this is what happened in the appeals court, which failed to apply the presumption.

Because *Gilmer* constituted "the law" at the time of passage of the CRA, arbitration of statutory discrimination claims was – and is – indeed "authorized by law" and "encouraged" by Section 118.

B. Subsequent Congressional Efforts to Amend the CRA Demonstrate Congress's Understanding That Current Law Does Not Preclude Pre-Dispute Arbitration Agreements.

Since *Gilmer*, and subsequent to the enactment of the CRA, various members of Congress have introduced legislation intended to amend the law to preclude the use of arbitration agreements for claims brought under Title VII and other statutes, such as the Americans with Disabilities Act and

the ADEA.[15] However, none of these initiatives has become law.

Significantly, though, each of these bills has been introduced as an effort to amend, rather than to clarify, the relevant statutes. These efforts further reflect Congress's awareness that the plain language of the CRA simply does not preclude arbitration of employment discrimination claims. The courts generally have agreed. Indeed, prior to Judge Reinhardt's decision in this case, each of the Courts of Appeals to consider the issue, including the Ninth Circuit, shared the view that agreements to arbitrate Title VII claims are enforceable.[16]

III. Contrary Views Among the Courts of Appeals and the Equal Employment Opportunity Commission Make this Case Particularly Appropriate for *Certiorari*.

A. Employers Have a Strong Interest in the Resolution of this Case Because Until Now the Courts of Appeals Have Held That Most Workplace Arbitration Agreements Are Governed by the Federal Arbitration Act.

The Federal Arbitration Act, which embodies the federal policy in favor of arbitration agreements, clearly applies to the facts of this case. *Gilmer*, 500 U.S. at 25, n.2 (finding that the

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[15] *See, e.g.*, H.R. 3748, 104th Cong., 2d Sess. (1996); S. 366, 104th Cong., 1st Sess. (1995); and S. 2012, S. 2327, and H.R. 4981/S. 2405, 103d Cong., 2d Sess. (1994).

[16] *See Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932 (9th Cir. 1992) (interpreting *Gilmer* and concluding that Congress did not intend to preclude Title VII claims); *see also Pryner v. Tractor Supply Co.*, 109 F.3d 354 (7th Cir. 1997); *Cole v. Burns Int'l Sec. Svcs.*, 105 F.3d 1465 (D.C. Cir. 1997); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 700 n.1 (11th Cir. 1992); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229 (5th Cir. 1991).

FAA applied to the securities industry U-4 registration form). Section 1 of the FAA, however, excludes at least some contracts of employment from its scope. 9 U.S.C. § 1 states "...nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Although the Court has never had occasion to decide whether the Section 1 exclusion applies to *all* contracts of employment, *see Gilmer* at 36-37 (Stephens, J. dissenting), nearly every Circuit has determined that the exclusion should be construed narrowly.[17]

In these Circuits, most employment contracts will be held to fall within the scope of the Act. Therefore, although this case directly affects the arbitration agreement used in the securities industry, most employers have a substantial interest in the resolution of the underlying issue of whether the CRA carves out employment discrimination claims from the FAA. *See Seus,* 146 F.3d at 178-179.

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[17] *See McWilliams v. Logicon, Inc.*, 143 F.3d 573 (10th Cir. 1998); *Paladino v. Avnet Computer Tech Inc.*, 134 F.3d 1054, 1069-71 (11th Cir. 1998) (majority concurrence); *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222, 226-27 nn.20-21 (3d Cir.), *cert. denied*, 118 S. Ct. 299 (1997); *Cole v. Burns Int'l Sec. Svcs.*, 105 F.3d 1465 (D.C. Cir. 1997); *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 747-48 (5th Cir. 1996); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 600 (6th Cir. 1995); *Miller Brewing Co. v. Brewery Workers Local Union No. 9, AFL-CIO*, 739 F.2d 1159 1162 (7th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1973); *Dickstein v. duPont*, 443 F.2d 783, 785 (1st Cir. 1971).

B. The Court Should Provide Definitive Guidance With Respect to Employment Discrimination Legislation.

As this Court has noted, adherence to principles of *stare decisis* is particularly important in the context of civil rights legislation, because Congress is always free to overrule the Court's statutory interpretations. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73. Although *Gilmer* is a relatively new precedent, it is not so new, nor its effect so limited, that the validity of the Court's decision should be lightly disregarded. "It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law." *Rivers v. Roadway Express*, 511 U.S. 298, 312 (1994).

Until now, pursuant to *Gilmer* and the FAA, the law on the arbitrability of statutory claims under individual employment agreements was clear. Any ambiguity in such an agreement regarding the arbitrability of a dispute was to be resolved in favor of arbitration. Section 118, by its terms, simply reinforced this principle. *See Mouton v. Metropolitan Life Insurance Co.*, 147 F.3d 453, 456 (5th Cir. 1998) ("'all ambiguities must be resolved in favor of arbitrability'") *quoting Armijo v. Prudential Insurance Co. of America*, 72 F.3d 793, 798 (10th Cir. 1995); *see also Seus v. John Nuveen & Co.*, 146 F.3d 175, 180 (3d Cir. 1998).

Nonetheless, the Ninth Circuit's decision here, and the position taken by the Equal Employment Opportunity Commission ("EEOC"), have led to confusion and uncertainty regarding the use of pre-dispute arbitration agreements in the non-unionized workplace.

The EEOC, which participated in the proceedings below as an *amicus curiae*, has taken the position that Section 118 evinces a Congressional intent to preclude pre-dispute

arbitration agreements for Title VII claims. In addition, the EEOC has taken the position that arbitration of claims under the Americans with Disabilities Act and the Age Discrimination in Employment Act is likewise unenforceable. 1997 EEOC Policy Statement, No. 915.002, July 10, 1997. Furthermore, the agency has made it a priority to participate in cases in which pre-dispute arbitration agreements are invoked, seeking to invalidate those agreements. *See* Equal Employment Opportunity Commission National Enforcement Plan, posted at www.eeoc.gov/nep.html (listing cases challenging obligations to arbitrate among the agency's top priorities) (last updated on January 15, 1997). The Ninth Circuit's opinion in this case, coupled with the EEOC's commitment to challenging pre-dispute arbitration agreements as unenforceable when applied to statutory civil rights claims, make it certain that courts will now disagree about this issue, unless the Court grants *certiorari* and provides definitive guidance.

C. The Employer Community Is Increasingly Turning to Alternative Dispute Resolution, Including Arbitration, to Resolve Employment Disputes.

Employers, reasonably believing that arbitration can more swiftly and cost-effectively resolve employee disputes – and improve employee relations – are increasingly turning to ADR, including mandatory arbitration. Arbitration agreements, implemented so as to preserve the substantive rights of those they protect, should not be discouraged. *See Cole*, 105 F.3d at 1482-83.

According to the United States General Accounting Office ("GAO"), in 1994 an estimated 52 percent of large employers (defined as those with more than 100 employees) utilized some type of alternative dispute resolution process to resolve discrimination complaints. Roughly 80 percent of those

employers used mediation, about 39 percent used peer review panels, and approximately 19 percent used arbitration. *See U.S. General Accounting Office, Employment Discrimination: Most Private-Sector Employers Use Alternative Dispute Resolution*, GAO/HESH-95-150, (July 5, 1995).[18] According to the GAO study, employer interest in alternative dispute resolution grew correspondingly with the volume of discrimination charges filed with the EEOC and the length of time for the agency to complete its review of each charge.[19] Other scholars have noted an increasing willingness on the part of employers to develop ADR programs in order to reduce legal fees, decrease turnover, and improve employee relations. *See, e.g.,* John Zinsser, *Employment Dispute Resolution Systems: Experience Grows But Some Questions Persist,* Negotiation J. (April 1996) at 151, 153 (discussing Brown & Root's motivation for developing a four-step mandatory dispute resolution program, which can culminate in arbitration).

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[18] This publication is available through the GAO website at www.gao.gov.

[19] The number of discrimination charges filed with the EEOC grew by 43 percent between fiscal years 1991 and 1994. By fiscal 1997, the average time to process a charge of discrimination was 358 days. *Summary of Enforcement Data and Budget and Staffing Information for the EEOC: FY 1991 through FY 1997*, Office of Communications and Legislative Affairs, Equal Employment Opportunity Commission (December 8, 1997). In order to reduce its backlog, the agency adopted a "triage" system to dispose of many charges on an expedited basis. The EEOC announced on August 12, 1998 that it has cut its inventory of discrimination charges almost in half – from almost 111,000 charges in 1995 to just under 58,000 today. Nonetheless, a lack of funding and a failure to appoint new Commissioners have left practitioners concerned about the agency's continued ability to function. *See* Darryl Van Duch, *Paralysis for EEOC Feared*, Nat'l L. J., August 24, 1998, at 1, 21.

Data regarding the outcomes of arbitration of employment discrimination claims is not yet widely available. Among the employers that have shared data on their ADR programs, however, it is clear that arbitration can achieve a swift resolution of employment discrimination claims, while simultaneously providing employees with inexpensive access to a hearing and a neutral factfinder. For example, Brown & Root found that it was able to cut its legal fees by 40 percent in the first two years of its program, while its cost in settlements and adverse judgments remained steady. In addition, *the company* credited the program with saving its employment relationship with *300 employees*. *Id.* at 161.

Some experts have suggested that alternative dispute resolution overall is more likely to benefit employees – especially those with modest financial resources – than to benefit employers, by expanding employees' access to remedies. Noting that employees often prefer swift, less expensive, private relief to becoming part of "test" cases, three former EEOC officials concluded that, "[t]he reality is that a more informal, simpler, and less confrontational system like ADR will encourage more valid complaints of discrimination to come forward. For many individuals, ADR expands access to the legal system." R. Gaull Silberman, Susan Murphy, and Susan Adams, *Alternative Dispute Resolution of Employment Discrimination Claims*, 54 La. L. Rev. 1533, 1558 (1994).

Thus, ADR is not unfair or one-sided. Professor Theodore J. St. Antoine has observed that employers, too, alter the procedural landscape when they agree to pre-dispute arbitration. Citing the findings of the Commission on the Future of Worker-Management Relations (the "Dunlop Commission"), St. Antoine suggests that employers are unlikely to agree to binding arbitration *after* a dispute is filed in court because, in most cases, the claim will go nowhere or the employer will prevail on summary judgment. As a result, most employees' discrimination cases never reach a judicial

hearing on the merits. "For employers, the desired trade-off [in consenting to pre-dispute arbitration] is the one *big* case against the many smaller ones." Concluding that the majority of ordinary employees may fare better in arbitration than in litigation, he counsels against rejecting pre-dispute arbitration, at least before more empirical evidence is gathered. *See* Theodore J. St. Antoine, *Mandatory Arbitration of Employee Discrimination Claims: Unmitigated Evil or Blessing In Disguise?*, 15 Thomas M. Cooley Law Rev. 1, 8 (1998).

In sum, the increase in mandatory arbitration programs is not only an outgrowth of *Gilmer* and the CRA; it also is a very practical reaction to ever-burgeoning employment discrimination litigation. Arbitration agreements, as long as they provide an accessible, fair, and neutral forum for the resolution of such claims,[20] have proven to be effective in many cases. In the future, they may well become the preferred method of dispute resolution for both employers *and* employees. The Ninth Circuit's tortured interpretation of Section 118, if allowed to stand, will stifle this very positive development for *all* concerned.

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[20] *See Cole*, 105 F.3d at 1483-86 (enforcing a pre-dispute arbitration agreement as to Title VII claim, but interpreting the agreement to provide that the employer pays the arbitrator's fees for both parties).

CONCLUSION

For the foregoing reasons, the Chamber of Commerce of the United States respectfully urges the Court to grant *certiorari*, so that the Court may consider whether Section 118 of the Civil Rights Act of 1991 permits or prohibits the enforcement of pre-dispute arbitration agreements.

Respectfully submitted,

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